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Reply Comments in support of the Petition issued by the Southern Public Communication Association

To preface these reply comments, we the Payphone Service Providers (PSP's) of Ohio are genuinely appreciative of the hard work and effort exhibited by Ohio's Public Utilities Commission ("PUCO") to ensure future payphone rates are in accordance with the FCC's New Services Testing ("NST") mandated in FCC 96-128.

However as an organization representing Ohio's payphone providers, we are honestly horrified regarding their position on refunds. The PUCO is quite critical of any argument for refunds, concluding that properly setting the rates on a prospective basis is more then enough. They point out that many state commissions, including Ohio had allowed the BOC's to charge payphone providers fees that were unreasonable and unlawful, that required "substantial decreases" in order to comply with the FCC's mandates. According to the PUCO, the FCC relied on the states, they were "charged with" and "responsible" for timely implementing and enforcing the provisions of the act. There is little doubt that in retrospect many states, including Ohio, Illinois and Mississippi must agree that they did not have NST compliant rates in effect on April 15th, 1997 as required.

Some seven years have now past. State commissions are completing the hearings needed to establish payphone rates compliant with the FCC's orders issued in 96-128, that were expected to be effective no later then April 15th, 1997. In comments filed, Ohio used words like "charged with" and "responsibility". The PUCO points to the SPCA and IPTA request for clarity as an effort to circumvent the Commission's delegation to the states, it is in fact an effort to correct the states that have failed to properly carryout the FCC mandates. The Commission should be aware that their orders are currently being circumvented. The very state commissions who oppose refunds were unable to ensure that NST compliant rates were in place on April 15th, 1997. The states defended this failure by allowing the BOC's to self certify or by approving tariff's without review. In Ohio, SBC self certified that its rates were compliant with the mandated NST, but informed the state that it did so pursuant to the waiver order, and agreed to issuing refunds if rates were revised downward. The PUCO failed to ensure that the effective rates were compliant by April 15th, 1997, allowed the BOC to self-certify, accepted an agreement that was predicated upon the Waiver order, then claimed that the filed rate doctrine barred refunds. This appears to be more than unjustified.

Enough about state control, delegated authority or justification. The Commission held that BOC's were to implement NST compliant rates. They established a clearly defined effective date, then held BOC dial around compensation as a quid-pro-quo used as an incentive to compel the BOC's to timely comply. The states were "charged with" the "responsibility" of ensuring that the rates did comply, were timely filed and were filed in accordance with state law. We raise the issue of self-certification, a tactic that allowed the BOC's to in effect represent to the state that their rates were among other mandated requirements, NST compliant. Pursuant to this representation, in fact relying upon it, some states did not block the BOC's rights to collect dial around. However in retrospect, states using the filed rate doctrine to protect a BOC who

represented that it complied with the NST pricing obligation, but had non-compliant rates in effect gave the BOC's a "double windfall". The Commission order blocked dial around revenues to those BOC's who did not implement NST compliant rates. Those that collected these revenues did so in violation of the law. To allow them to keep the revenue without first being in compliance is an obvious unintended windfall. The Commission order also required BOC's to have NST compliant rates in effect no later than April 15th, 1997. To allow them to keep the difference, the excessive charges, without ordering a refund is also an obvious unintended windfall.

It is unjustified and beyond the authority of the states to so haphazardly implement the orders of the Commission. It is unreasonable that states relied solely on the BOC's representation and approved non-compliant tariffs, without review. Ohio claims to have approved a tariff issued by SBC almost three months after the payphone association filed a challenge of the then effective rate. The word "claims" is meaningful. While Ohio claims that it approved a compliant SBC tariff on September 25th, 1997, no tariff was ever filed with the state for review. While the state stands it ground, the record speaks clearly for itself. In denying refunds, Ohio cited the filled rate doctrine and their reliance on a tariff approved on September 25, 1997. In numerous documents and briefs, SBC does not support or recognize a tariff filing, and claims to be reliant on their tariff issued in 1985. Ohio believes that the filed rate doctrine limits the states regardless of the circumstances. For instance, if SBC had filed a tariff that was non-compliant and unlawful, does the filed rate doctrine still protect the BOC? Did the states have an obligation to ensure compliant rates? Do the states have an obligation to maintain the effective date, thereby pre-empting the filed rate doctrine? If the state accepted a representation and assurance from the BOC that its rates complied with the pricing obligations, and that representation was false, is the BOC liable? Or should the BOC refund the dial around? If the BOC represented that it relied on the Waiver Order, and promised refunds, does the filed rate doctrine invalidate the effects of Waiver order and BOC promise?

The very fact that state Policies and Procedures complicated timely enforcement, that conflicting state law may work to circumvent the mandates of the FCC, provides a clear basis and need for a declaratory ruling. We the payphone providers of Ohio support the petition, and ask the FCC to timely issue a declaratory ruling.


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